

**SUPPLEMENTAL AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA AND
THE EUROPEAN POLICE OFFICE
ON THE EXCHANGE OF PERSONAL DATA
AND RELATED INFORMATION**

The United States of America and the European Police Office (Europol) ("the Parties");

Considering that the Agreement of 6 December 2001 between the United States of America and Europol ("2001 Agreement") contemplates subsequent supplementation in order to address the exchange of personal data;

Considering that it is in their common interest to extend their cooperation to, inter alia, the exchange of personal data, with due regard to the rule of law and protection of individual rights and liberties;

Considering that the Council of the European Union has given Europol the authorization to enter into negotiations on a cooperation agreement including the exchange of personal data and to agree to the following provisions with the United States of America;

Considering the letters exchanged between the Parties, and the letter attached thereto, which amplify the meaning of this Agreement;

Have agreed as follows:

**Article 1
Purpose**

The purpose of this agreement is to enhance the cooperation of the Member States of the European Union, acting through Europol, and the United States of America, in preventing, detecting, suppressing, and investigating criminal offenses within the respective jurisdiction of the Parties, in particular by facilitating the reciprocal exchange of information, including personal data.

**Article 2
Definitions**

For purposes of this Agreement:

- (a) "personal data" means any information relating to an identified or identifiable natural person;
- (b) "identifiable natural person" means a natural person who can be identified, directly or indirectly, by reference to, in particular, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;
- (c) "processing of personal data" means any operation or set of operations which is performed upon such data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, combination, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

Article 3

Scope of assistance

1. The Parties may exchange information, including personal data, between themselves, in accordance with the provisions of this Agreement.
2. The exchange of strategic and technical information shall continue to be governed by the 2001 Agreement. Articles 4, 6 and 8 of the 2001 Agreement shall apply to this Agreement, *mutatis mutandis*.
3. This Agreement is intended solely for the purpose of cooperation between the Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request, nor shall it derogate from any pre-existing right of a private party to do so.
4. Nothing in this Agreement may be interpreted in a manner that would prejudice or restrict the provisions of any Mutual Legal Assistance Treaty, working law enforcement relationship, or any other agreement or arrangement for the exchange of information between the United States of America and any Member States or institution of the European Union.
5. The Parties may carry out forms of cooperation other than the exchange of information to the extent and under the terms and conditions mutually agreed upon by them.

Article 4

Communications between the Parties

1. Requests and responses to requests under this Agreement may be made in writing, by any other means capable of producing a written record, or orally with written confirmation to follow if required by the requested Party. Where feasible, a written request may be transmitted through fax, e-mail, or other means for expediting communications, providing, where necessary in a particular matter, appropriate security measures.
2. Requests and responses to requests shall be transmitted either directly between the points of contact designated pursuant to Article 4 of the 2001 Agreement, or, if the points of contact agree in writing, directly between Europol and designated U.S. federal, state or local authorities.
3. A request shall provide a concise statement identifying the authority making the request, the matter under consideration, the reason for the request, and the nature of the assistance sought.
4. A Party may, without prior request, forward to the other Party information when it considers that disclosure of such information might assist the receiving Party. A brief statement of the reasons for forwarding the information shall be provided to the extent feasible and necessary, or to the extent required by the applicable legal framework of the forwarding Party.

Article 5

General terms and conditions

1. (a) Transmission of information under this agreement to, and its further processing by, the receiving Party shall be for the purposes set forth in the request, which shall be deemed to include the prevention, detection, suppression, investigation and

prosecution of any specific criminal offenses, and any specific analytical purposes, to which such information relates. Where the receiving Party seeks the use of such information for other purposes, it shall ask for the prior consent of the Party that furnished the information.

(b) Notwithstanding subparagraph (a), nothing in this Agreement shall prevent the receiving Party from:

- (i) disclosing in its proceedings, information or evidence that tends to exculpate an accused person. In this situation, the receiving Party shall notify the transmitting Party in advance of disclosure, or, in an exceptional case in which advance notice is not possible, without delay thereafter.
 - (ii) using without restriction information or evidence that has been made public as a normal result of having been provided.
2. The transmitting Party shall indicate the agency from which the information concerned originated.
3. Unless already in the public domain, information exchanged under this Agreement will be treated as law enforcement information and afforded protections, including all appropriate security measures, in accordance with domestic law and applicable regulations. In particular, information marked as "Europol 1" to "Europol 3" shall be protected as "law enforcement sensitive material" and handled in the same manner as information of a similar sensitivity held by the United States of America. Europol shall treat "law enforcement sensitive material" transmitted by the United States of America as equivalent to "Europol 1" for purposes of security, unless otherwise requested pursuant to paragraph 5 of this Article. It is the responsibility of the transmitting Party to ensure all appropriate marks are fixed to the materials so transmitted.
4. The Party to which a request for assistance under this Agreement has been made shall endeavor to limit the circumstances in which it refuses or postpones assistance to the greatest extent possible. Before refusing or postponing assistance, that Party shall, where appropriate after having consulted with the requesting Party, consider whether the request may be granted partially, or subject to conditions. If the receiving Party cannot comply with such conditions, it shall notify the providing Party, which shall then determine whether the information shall nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them. Where the need for such conditions becomes apparent following transmission due to changed circumstances, the Parties shall promptly discuss available remedies.
5. A request for assistance pursuant to this Agreement shall be executed in accordance with and subject to the limitations of the applicable laws and regulations of the Party receiving the request, and within the limits of its available resources.

Article 6

Transmission of special categories of personal data

Personal data revealing race, political opinions, or religious or other beliefs, or concerning health and sexual life, may be provided only upon the transmitting Party's determination that such data is particularly relevant to a purpose set forth in Article 5, paragraph 1.

Article 7

Authorities competent to receive information

1. (a) Information supplied by Europol under this Agreement shall be available to competent U.S. federal authorities for use in accordance with this Agreement.

(b) Such information shall also be available for use by competent U.S. state or local authorities provided that they agree to observe the provisions of this Agreement, in particular Article 5, paragraph 1.
2. Europol shall ensure that information supplied by the United States under this Agreement will only be made available to the competent law enforcement authorities of the Member States of the European Union or for use within Europol.
3. Onward transmission of information to international institutions, or to third States, will only take place with the prior written consent of the Party that supplied the information, unless already in the public domain.

Article 8

Requests for supplemental information

A Party may seek information to supplement that previously received pursuant to this Agreement, including, where not ascertainable from the information previously provided, the transmitting Party's assessment of the accuracy of such information, and of the reliability of the source of such information.

Article 9

Maintaining the accuracy of information

1. Each Party shall maintain information provided pursuant to this Agreement under a system of record keeping that facilitates the ability of its law enforcement authorities to carry out their activities on the basis of accurate information.
2. Each Party shall maintain a system of database and document control that provides for the orderly disposal, at intervals to be provided for by domestic law or administrative regulation, of information that has been received.
3. Where a Party becomes aware that non-public information it has received from the other Party is not accurate, it shall take all appropriate measures to safeguard against erroneous reliance on such information by its law enforcement authorities, which may include supplementation, deletion or correction of such information.
4. Where a Party becomes aware that information it possesses causes significant doubt as to the accuracy of information received pursuant to this Agreement, or an assessment made by the other Party of the accuracy of information or the reliability of a source, it shall, where feasible, advise the other Party thereof.

Article 10
Access by private persons or entities

1. Where a private person or entity requests from a Party access to information received by that Party under this Agreement that is not already in the public domain, the transmitting Party shall be consulted.
2. Where the transmitting Party does not consent to the release of the information, the receiving Party shall not release it. Should a decision not to release information be challenged, whether administratively or through judicial proceedings, the receiving Party shall, by all legal means within its power, advise, assist, appear and represent the transmitting Party's interests in connection therewith. Should the receiving Party become subject to a final order requiring it to release information to which the transmitting party had not consented, the receiving Party shall notify the transmitting Party in advance of disclosure, or, in an exceptional case in which advance notice is not possible, without delay thereafter.
3. This Article is without prejudice to any rights an individual may have under the law of the transmitting Party to seek release of information from that Party, or other appropriate relief.

Article 11
Expenses

Neither Party shall make any pecuniary claim against the other Party for expenses arising out of the execution of this Agreement. Should expenses of an extraordinary nature arise out of the execution of this Agreement, the Parties may consult with a view to determining the manner in which they shall be addressed.

Article 12
Oversight of implementation

The execution and implementation of this Agreement by the Parties shall be subject to oversight in accordance with their applicable law and procedures. The Parties shall utilize their respective administrative, judicial or supervisory bodies that will ensure an appropriate level of independence of the oversight process.

Article 13
Consultation

The Parties may consult, as appropriate, to promote the most effective use of this Agreement.

Article 14
Evaluation, amendment, and termination of the Agreement

1. Within two years after the entry into force of this Agreement, its implementation will be jointly evaluated by the Parties.
2. This Agreement may be amended by mutual consent between Europol and the United States of America at any time, in accordance with their respective applicable internal procedures.
3. This Agreement may be terminated by either Party upon three months' written notice.

Article 15
Entry into force

This Agreement shall enter into force on the first day following its signature.

Done at COPENHAGEN on the 20 day of DECEMBER 2002,
in duplicate, in the English language.

FOR UNITED STATES OF AMERICA:

Greg Mathiesen Light
Chargé d'Affaires, a.i.

EUROPOL:

J. Kunk



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

December 20, 2002

Dear Mr. Storbeck:

I refer to your letter which reads as follows:

"Exchange of Letters related to the Supplemental Agreement between the United States of America and Europol on the exchange of personal data and related information"

With respect to the Supplemental Agreement between the United States of America and Europol on the exchange of personal data and related information, the Parties would like to amplify the following points:

1. Liaison Officers and Privileges and Immunities

Europol is committed to support the position that any United States officials posted as Liaison Officers to Europol will receive reciprocal treatment to Europol officials posted as Liaison Officers in the United States. The United States regards such reciprocity as a necessary basis for maintaining privileges and immunities for Europol Liaison Officers in the U.S. at their current level.

The Parties refer to a letter sent by the United States State Department, which amplifies the issue of immunity for Europol under U.S. legislation and case law. This letter is annexed to this exchange of letters and shall be considered to be an integral part of it.

2. Article 1

The Parties note that for Europol the term "jurisdiction" in Article 1 refers to its mandate as laid down in the Europol Convention.

3. Article 3

The Parties note that information which is not strategic or technical information, as defined under the Agreement of 6 December 2001, will be covered by the Supplemental Agreement, in accordance with Article 3 (2) of the Supplemental Agreement.

The United States takes note that the other forms of co-operation foreseen under Article 3 (5) can only be contemplated by Europol as far as such co-operation is compatible with Europol's legal framework and any other applicable legal instrument which applies to such forms of co-operation.

4. Article 4

With respect to paragraph 4 the United States take note that under Europol's legal framework, it may only forward without prior request personal data under the Supplemental Agreement where it is necessary in individual cases for the prevention or combating of criminal offences for which Europol is competent. In the event that Europol shall find itself unable to directly forward such information to the United States it shall endeavour to obtain the consent of a Member State to transmit the information to U.S. authorities itself.

5. Article 5

The Parties agree that the phrase "prevention, detection, suppression, investigation and prosecution of any specific criminal offences and for any analytical purposes to which such information relates" as used in Article 5, paragraph 1 *sub* (a), includes, *inter alia*, exchange of information pertaining to immigration investigations and proceedings, and to those relating to *in rem* or *in personam* seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction.

The United States takes note of the fact that under its legal framework, Europol may not presently authorise usage for other purposes than those included in paragraph 1.

The United States also takes note of the fact that under its legal framework, Europol may not presently transmit to the United States data that were transmitted to it by a Member State under this agreement without that Member State's prior consent.

Article 5, paragraph 4, of the Supplemental Agreement is to be understood not to permit the imposition of generic restrictions with respect to the sharing of personal

data, additional to the express requirements of the Agreement, as a precondition to be imposed by either Europol or one of its Member States.

6. Article 6

The Parties agree that for Europol the term "particularly relevant" as used in this Article shall be understood in the same sense as the term "absolutely necessary" under Europol's regulations connoting information with a significant degree of usefulness. The term "race" is interpreted by Europol to include racial origin, whereas for the U.S. it shall reflect the concept of ethnicity.

7. Article 7

With respect to paragraph 1, the Parties note that "competent authorities" shall mean those authorities who are responsible for functions relating to the prevention, detection, suppression, investigation and prosecution of criminal offences.

With respect to paragraph 3, the United States takes note of the fact that under its legal framework Europol is not allowed to provide authorisation for onward transmission beyond that reflected in this Agreement; conversely this Agreement shall not be relied upon as authority for Europol or its Member States to cause the onward transmission of data supplied by the U.S. except as authorised by this Agreement.

8. Article 12

The United States notes that under its laws and procedures, as well as those of Law Enforcement authorities at state and local levels, there are objective bodies and authorities authorised to oversee as appropriate the execution and implementation of the Supplemental Agreement. For example, various departments and agencies at the federal, state and local levels have established, by specific statutory provisions, regulations or administrative actions, offices of Inspectors-General, Internal Affairs divisions, or have designated senior officials or other components to oversee the general application of laws and procedures within the departments' or agencies' mandate or specific aspects thereof.

9. Article 14

With respect to Article 14, the Parties note that the joint evaluation foreseen in this Article will be aimed at determining if there is a need for further enhancement of the Agreement in all aspects, including the issues covered by this Exchange of letters."

I confirm that the foregoing proposal is acceptable and shall form an integral part of the Supplemental Agreement regarding the exchange of personal data and related information.

Sincerely,



Mark M. Richard
Counselor For Criminal Matters
United States Mission to the
European Union

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } ss

I, Rekha Arness, Consul of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that Mark M. Richard whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 20th day of December 2002 the date thereof

duly commissioned and qualified, to whose official acts faiths and credit are due.

IN WITNESS WHEREOF I have herunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 20th day of December 2002.

Rekha Arness

Rekha Arness
Consul



United States Department of State

Washington, D.C. 20520

November 26, 2002

Mr. Juergen Storbeck
Director
Europol
Raamweg 47, The Hague
The Netherlands

Re: Europol – Coverage under the Foreign Sovereign Immunities Act

Dear Director Storbeck:

I understand that as part of its process of review and approval of the Supplemental Agreement between the United States of America and Europol, the European Union has inquired regarding the extent to which Europol could be held liable for damages in U.S. courts based on its transmission of information to the U.S. under that Agreement. The U.S. legal framework relevant to this inquiry is set forth in the Foreign Sovereign Immunities Act ("FSIA"), Title 28, United States Code, Section 1602 et. seq.

There is an important preliminary point regarding the operation of the FSIA. A key objective in enacting the FSIA was to remove decisions over sovereign immunity from the Executive Branch and to place these decisions in the hands of the judiciary. Section 1602 (Findings and Declaration of Purpose) states that "determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States." Thus, while we are happy to discuss in general how our courts have addressed several issues which could be relevant to coverage of Europol under the FSIA, you should be aware that the courts are legally authorized to make these determinations and only they could make a binding decision regarding Europol.

That being said, with respect to potential liability of a foreign state in a suit brought in a U.S. court, the FSIA provides a presumption of immunity for a foreign state from the jurisdiction of U.S. courts, 28 U.S.C. 1604, unless the conduct forming the basis of the suit falls within a specific exception set forth in that statute, 28 USC 1605-1607.

A threshold question is whether the FSIA protections apply to an organization like Europol, which was established by treaty between a group of foreign governments rather than by a single foreign government. In a similar factual scenario, a U.S. court held that another European treaty-based organization, whose officials perform functions typically performed by national governmental agencies, qualified as a "foreign state" under the terms of the statute. See

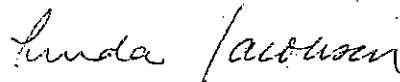
In re EAL Corp. v. European Organization for the Safety of Air Navigation, 1994 Lexis U.S. Dist. 20528 (D. Del. 1994). See also Gardiner Stone Hunter International v. Iberia Lineas Aereas de Espana, 896 F. Supp. 125, 131 (S.D.N.Y. 1995) (fn 6 and cases cited therein). The activities that Europol would engage in under the agreement - exchange of law enforcement information with the U.S. - are the type of governmental activity for which the FSIA provides protection. See e.g., Herbage v. Meese, 747 F.Supp. 60, 66-67 (D.D.C. 1990).

Another issue is whether immunity also extends to Europol officials carrying out duties under the Supplemental Agreement. Some U.S. courts have held that individuals acting as agents of the foreign sovereign in carrying out such governmental activities enjoy the same immunity as the sovereign itself. Id. at 66. Of course, the Europol liaison agents accredited to the United States already enjoy immunities in this country based upon their status as members of the EC Mission to the United States.

While Section 1605(a)(5) does provide an exception to foreign sovereign immunity for torts occurring in the United States, this exception would not appear applicable to the transmissions of information from Europol to U.S. law enforcement contemplated under the agreement. In Argentine Republic v. Amerasia-Hess, 488 U.S. 228 (1988), the United States Supreme Court construed Section 1605(a)(5) to apply only where a tort has been committed within the territory of the United States, not where it was committed outside the U.S. even if it caused effects within the U.S. A reading of the FSIA reveals no other exception to immunity that would appear applicable to Europol activities under the Supplemental Agreement.

I hope this information is helpful in your consideration of the potential scope of liability in U.S. courts for cooperation between the U.S. and Europol under the Supplemental Agreement.

Sincerely,



Linda Jacobson
Assistant Legal Adviser
Law Enforcement and Intelligence

File number: 3710-84

Mr. Mark M. Richard
Counselor For Criminal Matters
United States Mission
to the European Union

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8. Article 12

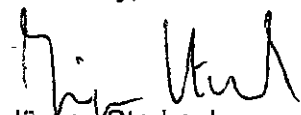
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Jürgen Storbeck,
Director